Supreme Court, U.S.
FILED
06-380 SEP 12 2006
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No. 06-

IN THE

Supreme Court of the United States

S. EMANUEL LIN, d/b/a
APTUS COMPANY

Petitioner,

v.

THE UNITED STATES

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether all claims under Contract Disputes Act of 1978 ("CDA"), 41 U.S.C. 601 *et seq.*, must be timely materialized for the convenience of a pending trial? Does Contract Disputes Act permit only one trial to resolve all claims of differing maturities?

Whether Government may "assign and transfer" a defaulting contractor's assets to others and whether the U. S. Court of Federal Claims has jurisdiction under Contract Disputes Act over a contractor's cause of action seeking the return of such residual assets/equities?

LIST OF PARTIES

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner herein and Plaintiff-Appellant in the United States Court of Appeals for the Federal Circuit below is Mr. S. EMANUEL LIN, doing business as APTUS COMPANY.

The Respondent here and Defendant-Appellee in the court below is the United States.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner S. Emanuel Lin, a proprietary electrical contractor, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit affirming Government's motion to dismiss Mr. Lin's cause of action seeking the return of his residual and un-spent asset under a default terminated contract.

OPINIONS BELOW

The non-precedential opinion of the United States Court of Appeals for the Federal Circuit is provided in Appendix on page 11 ("App. 11"). The non-precedential opinion of the United States Court of Federal Claims is included in App. 18.

JURISDICTION

The Federal Circuit entered its judgment on June 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the Federal Circuit was invoked under 28 U.S.C. § 1295(a)(3). The jurisdiction of the Court of Federal Claims was invoked under Contract Disputes Act of 1978, specifically 41 U.S.C. §609 (a) (1).

REGULATORY PROVISIONS INVOLVED

The case involves following Statues and Regulations:

31 U. S. C. § 3727	*Assignments of Claims*
41 U. S. C. § 15	*Transfers of contracts; assignment*
41 U. S. C. § 605	*Decision by contracting officer; Contract Disputes Act*
48 CFR 49.404	*Surety-takeover agreement*

STATEMENT

On November 5, 1998, Mr. Lin won a $1,265,110 contract to install $2,043,159 worth of government-furnished equipment (GFE) and to provide other new ones to modernize a hydro power plant in Michigan's upper peninsula near international border with Canada.

Notice to proceed was issued and acknowledged on December 9, 1998, and Mr. Lin relocated to the job site on February 14, 1999. After 565 days of performance with approximately $750,000 accrued equities, the contract was terminated for default on June 26, 2000. Mr. Lin was paid $56,497. App. 48.

With $1,106,613 remaining, Government and Chatham Reinsurance Corporation ("Chatham") whose certificate of authority as an acceptable federal surety had been revoked on March 31, 2000 signed a Tender Agreement on September 8, 2000 to allow L&S Electric to complete the contract at $1,350,000, App. 48~51. The completion contract price exceeded the penal sum of $1,225,110 as affixed after a contract modification on Mr. Lin's performance bond.

Through paragraph 5, App. 50, of the said Tender Agreement, Government "expressly assigns and transfers to" Chatham Mr. Lin's assets accrued during his 565 days of contract performance:

> "5. As partial consideration for the foregoing, the Corps hereby expressly assigns and transfers to Surety, and subrogates Surety to, all claims, demands, causes of action, rights and equities which the Corps had, has or may ever have against APTUS Company arising out of, in any way relating to or evidenced by its Contract with APTUS Company, and agrees that the Surety may pursue such claims, demands,

causes of action, rights and equities as the Surety deems advisable."

Through paragraph 6, App. 50, of the said Tender Agreement, Government granted Mr. Lin, "its Principal, APTUS Company", the right to seek "equitable adjustment" or take other "causes of action":

"6. Nothing in this Tender Agreement, nor in Surety's performance hereunder, shall prevent the Surety from enforcing any and all claims, rights or causes of action which Surety or its Principal, APTUS Company, may have against the Corps, including, without limitation, any claim of APTUS Company that it was or is entitled to an equitable adjustment or is owed additional compensation under the Contract, or any claim of APTUS Company that the Corps wrongfully terminated the Contract."

Tender agreement is not exactly a takeover agreement as prescribed at 48 CFR 49.404 *Surety-takeover agreement.* App. 29. Chatham never took over the contract to its completion. Instead, upon a payment of $188,887.00 on September 29, 2000 to Government, Chatham was discharged of its liabilities with its performance bond returned in lieu of ones tendered by its completion contractor on "19 September 2000". App. 52. In other words, the completion contract was performed by L&S under a new set of performance and payment bonds.

Mr. Lin latter paid Chatham $175,000 to settle a Texas lawsuit seeking damages for $188,887 it had paid Government and others. A release of judgment was filed on January 15, 2003.

Completion contract's notice to proceed was issued to and acknowledged by L&S on September 14, 2000 with

"Liquidated Damages will be based upon the proposed final completion date of October 19, 2001". App. 54.

On June 18, 2001[1], Mr. Lin filed his original single count complaint, the "*Aptus I*" suit (docket no. 01-362C), challenging Government's default termination of his contract in the U. S. Court of Federal Claims.

Prior to Government's response, Mr. Lin filed at the counter of the court his first amended complaint, App. 39[2], on August 6, 2001 without leave of court. Trial court in its August 30, 2004 decision treated newly added causes of action as the original one for wrongful termination of the contract.

On December 20, 2001, or approximately two months after Government answered his first amended complaint, Mr. Lin served Government his first request for production of document pertaining to the three GFE supply contracts and two installation contracts: Mr. Lin's and L&S'.

On February 20, 2002, Government produced no document pertaining to L&S' equipment design and construction activities. Back in Houston, Texas approximately 1,700 miles away from job site, Mr. Lin was quite puzzled, as L&S should have completed the contract four months earlier according to its contract completion date of October 19,

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[1] Federal Circuit mistakenly stated in its opinion that "Mr. Lin, acting *pro se*, filed a lawsuit against the Government in the Court of Federal Claims on June 26, 2000", App. 22, instead of "on June 18, 2001". June 26, 2000 is the contract termination date.

[2] Mr. Lin's first amended complaint is live for *Aptus I* lawsuit, as two subsequent attempts to amend failed.

2001. Especially, as stated on page 9 of his April 3, 2003 *Motion to Compel the Production of Document* in *Aptus I*:

> " Out of the said 155 requested items, Government posted the following objection 146 times in its response on February 20, 2002:
>
> Response:
>
> We object to this request upon the grounds that it is unduly burdensome and oppressive to the extent that it requests documents that are irrelevant to any issue in this matter, documents that are in the possession or control of plaintiff, or documents that are equally available to plaintiff. Without waiving these objections, we have sent you separately copies of all documents that we have found that respond to this request."

For such seemingly inaccurate and evasive response, Mr. Lin asked the Government's attorney on June 4, 2002:

> " I do not see any daily construction and quality control reports in your response to my request item no. 148. May I rely on such lack of response to mean that there has not been any construction activities as of today? "

There was no response. On June 10, 2002, Mr. Lin submitted a Freedom of Information Act request for L&S' design submittals and daily construction activities reports and others. Mr. Lin thought Government was refusing to produce them under its stated objection.

On June 18, 2002, Mr. Lin requested to enter the power plant for the inspection of "power plant automation installation" and "for the purpose of examining and/or copying" the document previously requested but not produced.

On June 28, 2002, Government supplemented one box of document and three rolls of full-size drawings. But daily construction reports only lasted a few days and design drawings for several key equipment were still missing.

From that said box of document, Mr. Lin learned that L&S had made little progress in the first twelve months of its contract in designing its own equipment. Government was unable to provide L&S a set of reliable record drawings of existing power plant condition for L&S to work with. Same circumstance had challenged Mr. Lin's contract performance earlier.

To remove such deficiency, on June 19, 2001, or four months before the initial contract completion date, Government issued a contract modification P012, App. 55, for L&S to "conduct a comprehensive site survey", App. 58, "to compile a list of drawings to [be] upgraded", App. 57, to "show the true condition of pre-existing and newly installed equipment and appurtenances". App. 58.

On September 18, 2001, or 31 days before the initial contract completion date, Government issued a follow-up contract modification P016, App. 59, to upgrade twelve record drawings compiled after a comprehensive site survey under P012 for a total cost of $70,000.

The box of document produced on June 28, 2002 also revealed the fact that L&S was unable to proceed to field construction for the first "571" days of its contract. App. 61. Prior to "08 Apr 2002 - Monday", App. 61, there had been no construction, therefore there had never been any daily construction report to be found for production. However, Government's February 20, 2002 response to such request stated:

> " Without waiving these objections, we have sent you separately copies of all documents that we have found that respond to this request."

Such wholesale objection had been used to conceal and mislead the serious lack of progress in the completion contract.

On April 3, 2003, Mr. Lin filed a motion to compel the production of document not yet supplemented since or produced as of June 28, 2002. On April 28, 2003, Mr. Lin requested to enter power plant for inspection without success. On April 30, 2003, Mr. Lin submitted a single question interrogatory:

> " What is the state of Installation Contract? Plaintiff is interested in knowing whether the said project is completed. If it is completed or substantially completed, when was the Certificate of (Substantial) Completion issued and what other loose ends need to be taken care of? If it is "on its way to substantial completion", what remains to be done? Which generators still need to be upgraded with Government furnished property? Is SCADA system performing properly without crashing? Can the power plant be run from remote site? Are you waiting for additional software, parts, equipment or service to become available? If so, what are they? Have the old pressure tank and other hardware associated with the old governor and exciter at Unit 10 taken out of the basement and removed from this stand-alone power plant? If so, when were they removed?"

As of January 7, 2004, L&S' contract was still not complete. The cost of completion contract had risen from $1,350,000 on September 8, 2000 for October 19, 2001 completion to $2,172,081.65 as of January 7, 2004. App. 65.

Acting upon Mr. Lin's April 3, 2003 motion, trial court issued an order on June 4, 2003 for both parties to meet at job site on June 23, 2003[3], App. 62, to resolve the disputes on the production of requested document and for Mr. Lin to complete needed depositions in Michigan, Wisconsin, and Pennsylvania by September 15, 2003. App. 63.

In a separate scheduling order also filed on June 4, 2003, the court ordered:

> "1. All discovery shall be completed on or before September 15, 2003. . . .
>
> 7. The tentative start date of the trial shall be November 4, 2003. ..."

Mr. Lin was unable to conclude *Aptus I* discovery until L&S could complete its contract. However, paragraph 3 of trial court's June 4, 2003 order stated in part, App. 63:

> " Upon receipt by plaintiff of the documents pertaining to the performing contract (still in progress), plaintiff's discovery shall be deemed completed and concluded. "

To make the most out of the trip to Michigan on June 23, 2003, Mr. Lin verbally requested and received permission to tour the power plant to view and photograph L&S' installation. It was during this brief tour unintended for the purpose of inspection in the beginning and unsanctioned under the court's June 4, 2003 order that Mr. Lin discovered and photographed as evidence major deficiencies in the performance of the completion contract that Mr. Lin had funded with

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[3] Federal Circuit's opinion at App. 22 mistakenly stated that "This site visit occurred on June 23, 2003, three years after the initiation of the law suit." in stead of two years. The court mistakenly thought the suit was filed on June 26, 2000.

his accrued equities and had been over-penalized under the performance bond.

On October 9, 2003, or approximately three weeks after the completion of his multi-state depositions, Mr. Lin submitted his second certified CDA claims, the "*Aptus II* claims", seeking the return of his residual assets assigned in the paragraph 5 of the Tender Agreement toward the cost of under- or non-performing completion contract as of that day.

On October 14, 2003, Mr. Lin sought to amend his complaint and alternatively to stay the proceeding pending contracting officer's decision on his *Aptus II* claims.

On October 30, 2003, the court denied both motions and rescheduled the trial from November 4, 2003 to January 13, 2004. On November 25, 2003, the trial court stayed the trial commencement date of January 13, 2004 indefinitely for both parties to work out their respective stipulated and non-stipulated exhibits. Mr. Lin did not cause the delay in having the case tried.

On January 15, 2004, contracting officer denied Mr. Lin's *Aptus II* claims. On January 26, 2004, Mr. Lin renewed his motion to amend and to incorporate his *Aptus II* claims in the *Aptus I* complaint. On March 2, 2004, trial court denied the motion and the trial commenced on May 24, 2004 in Washington, DC.

After eight days of trial, the court dismissed *Aptus I* lawsuit on August 30, 2004. On January 12, 2005, Mr. Lin filed *Aptus II* suit. App. 31.

REASONS FOR GRANTING THE PETITION

Ancient warriors frequently quartered in people's house without the owner's consent. Once quartered, they, in modern terms, "assigned and transferred" freely people's as-

sets, like the food and cattle, to themselves in order to keep their war machine running.

Today, the assignment and transfer of a defaulting contractor's assets are routinely done through a standard form that produced the Tender Agreement at App. 48. It legitimizes an illegal act to fund its completion contract without contractor's knowledge, let along its consent.

In addition to seizing Mr. Lin's assets, Government trumped up its damage claims against surety to further enlarge its contract funding, such as including "an increase of $7,500 for the optional hiring of skilled craftsmen". App. 33. However, once being paid, those claims of deficiencies against Mr. Lin somehow disappear or no longer exist. This is not much different from an insurance fraud.

No one can justify defaulting a contractor, taking over $700,000 worth of its prior work for free and $188,887 of private citizen's indirect and involuntary contribution, ending up paying another contractor additional $946,971 to continue a completion contract at least two years behind schedule and finally claiming court's lack of jurisdiction to litigate the funding impropriety. It is against public policy to indulge such fraudulent, capricious, but prevailing contract practice.

Contract Disputes Act clearly allows parties to the contract to file suit pending contracting officer's denial of its claim submitted and accrued within six years. When Mr. Lin filed his *Aptus I* complaint, App. 39, on June 18, 2001, no reasonable person could foresee L&S' under-performance uncovered at the first chance in two years thereafter to visit the job site on June 23, 2003. Completion contract was performed by L&S, not Mr. Lin, and complaints at App. 31 and 39 are different to trigger the doctrine of *Res Judicata*.

CONCLUSION

Petitioner Mr. S. Emanuel Lin respectfully prays that a writ of certiorari be issued to give Mr. Lin a day in court.

Respectfully submitted

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

05-5165

APTUS COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: June 14, 2006

Before RADER, GAJARSA, and DYK, *Circuit Judges*.

RADER, *Circuit Judge*.

Mr. S. Emanuel Lin d/b/a Aptus Company (Mr. Lin) appeals the decision of the United States Court of Federal Claims dismissing his complaint pursuant to Rule 12(b)(6) and Rule12(h)(3) of the Rules of the Court of Federal Claims. Because the evidence supports the Court of Federal Claims dismissal, this court *affirms*.

I.

Mr. Lin won a contract to upgrade hydroelectric power equipment at the Saulte Ste. Marie Hydroelectric Power Plant in Michigan. The Government terminated this contract June 26, 2000 for lack of satisfactory progress, finding Mr. Lin in default. The Government then ordered the plaintiff's surety, Chatham Reinsurance Corp. (Chatham), to perform the remaining work. The Government and Chatham executed a Tender Agreement for L & S Electric, Inc. to complete the work required by the contract. As part of this agreement,

Chatham paid the Government $188,877, which was the difference in the cost for L & S to complete the project and what the government agreed to pay Mr. Lin for completion of the contract. Chatham then sued Mr. Lin to recover this payment in Texas state court and obtained a judgment in the amount of $205,559.50. Chatham gave a release to Mr. Lin in return for payment of $175,000.

Mr. Lin, acting *pro se*, filed a lawsuit against the Government in the Court of Federal Claims on June 26, 2000. *Aptus Co. v. United States*, 61 Fed. Cl. 638, *reconsideration denied*, 62 Fed. Cl. 808, *aff'd* 159 Fed.Appx. 186 (Fed. Cir. 2005), *cert denied*, 126 S.Ct. 1921 (May 1, 2006) (*Aptus I*) challenging the default termination. In August 2004, the trial court rejected Mr. Lin's challenge of the default decision, finding a justifiable basis for the Government's doubts about Mr. Lin's ability to complete the project. The trial court found that Mr. Lin had committed contract violations that constituted a material breach justifying the termination for default. *Id.* at 661-63.

During the discovery phase of *Aptus I*, Mr. Lin performed a site visit to determine if L & S completed its installation according to the terms of his default contract. This site visit occurred on June 23, 2003, three years after the initiation of the law suit. At this time, Mr. Lin alleged that he became aware of additional information relating to the contract and default termination that lead him to believe he was entitled to recover money as a result of the Tender Agreement.

Mr. Lin, however, waited until October 9, 2003, to submit new claims based on the additional information. The contracting officer denied the new claims on January 15, 2004 and Mr. Lin attempted to amend his complaint for a third time to add the newly denied claims. The trial court denied Mr. Lin's motion to amend because he had waited almost four months to submit the claims to the contracting officer, and even with extreme leniency granted to him as a result of his

pro se status, the trial court found that Mr. Lin had already caused significant delays in the proceedings.

Mr. Lin did not appeal this ruling. Rather, on January 12, 2005, Mr. Lin filed a new complaint against the Government in the Court of Federal Claims. *Aptus Co. v. United States*, No 05-106C, (Ct. Cl, June 27, 2005) (*Aptus II*). In its complaint, Mr. Lin attempted to advance the claims he initially tried to bring in *Aptus I* but was denied. Mr. Lin alleged in *Aptus II* that he was entitled to recover a portion of the money the government agreed to pay L & S to complete the contract. Specifically, the allegations set forth in the *Aptus II* complaint include: 1) the Government permitted L & S to hire a skilled craftsman, which increased the cost of the project by $7,500 beyond Mr. Lin's original contract; 2) L & S did not complete certain elements of the contract and therefore should not have been paid in full; 3) various modifications in the contract invalidated the damages in the Tender Agreement; 4) the Government acquiesced in L & S's failure to remedy certain deficiencies which contributed to Government's decision to terminate Mr. Lin's contract for default; and 5) assignment of Mr. Lin's interests in the original contract, first to Chatham and then to L & S, violated 31 U.S.C. § 3727 (2000) and 41 U.S.C. § 15 (2000) because Chatham's Certificate of Authority as an acceptable federal surety had been revoked. *Aptus II*, slip op. at 3.

The Government responded on March 14, 2005, with a motion to dismiss for failure to state a claim upon which relief can be granted. *Id.* The Government argued that Mr. Lin had not plead facts sufficient to set forth a basis for relief and that claim preclusion barred Mr. Lin's claims. *Id.*

The trial court granted the Government's motion. Regarding the fifth claim, the trial court determined that it lacked subject matter jurisdiction because the suretyship claim did not constitute a money-mandating provision under the Tucker Act. Thus, the court dismissed Mr. Lin's fifth claim pursuant to Rule 12(h)(3). *Id.* slip op. at 4. Regarding the

remaining four claims, the trial court dismissed them as barred by claim preclusion. *Id.* slip op. at 5-6. Mr. Lin argued that based on the trial court's denial of his motion to amend his complaint, he was deprived of a "full and fair opportunity to litigate" his claims. Thus, Mr. Lin argued that claim preclusion should not apply. The trial court determined that the parties were the same parties who received a decision on the merits in *Aptus I*, and Mr. Lin's claims were based on the same transactional facts as *Aptus I*. *Id.* The trial court noted that Mr. Lin had tried to add the very same claims to *Aptus I*. The trial court noted that a *pro se* plaintiff must be afforded leniency in their representation in proceedings, but that this leniency can only be afforded so far. *Id.* Thus, the trial court determined that "[r]ather than wait until the conclusion of *Aptus I* and file another suit, plaintiff's 'proper recourse was to appeal from the denial of his motion to amend.'" *Id.* Mr. Lin appeals this dismissal to this court, which has jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

II

This court reviews *de novo* the determination of whether the Court of Federal Claims properly dismissed a complaint for failure to state a claim upon which relief can be granted. *Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004). The determination of whether a claim is barred by the doctrine of *res judicata*, or claim preclusion, is also a question of law that we review *de novo*. *Faust v. United States*, 101 F.3d 675, 677 (Fed. Cir. 1996). Whether a claim is properly dismissed for lack of subject matter jurisdiction is a legal question, which this court reviews *de novo*. *McDonald v. United States*, 135 F.3d 778 (Fed. Cir. 1998). This court reviews the determinations regarding disputed jurisdictional facts upon which the Court of Federal Claims based its legal conclusion for clear error. *Id.*

"The general concept of claim preclusion is that when a judgment is rendered in favor of a party to litigation, the plaintiff may not thereafter maintain another action on the

same "claim" and defenses that were raised or could have been raised by the defendant in that action below." *Foster v. Hallco Mfg.*, 947 F.2d 469, 478-79 (Fed. Cir. 1991). "A second suit will be barred by claim preclusion if: (1) there is identity of parties; (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first." *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000). This court has adopted a "transactional" analysis for determining if two claims are based upon the same set of transactional facts. *Foster*, 947 F.2d at 478-79. Thus, claim preclusion precludes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions, out of which the action arose." *Id.* (citing *Restatement (Second) of Judgments* § 24(1)).

Here, as the trial court correctly determined, the first two elements of claim preclusion are met. The parties are the same as the parties in *Aptus I*. Further, *Aptus I* was decided on the merits after an extensive trial. Concerning the last factor, Mr. Lin argues the trial court erred in determining that Claims I-V in *Aptus II* "are based on the same set of transactional facts as those of Aptus I".[1] See *Aptus II*, slip op. at 5. Specifically, Mr. Lin argues that claim preclusion does not apply because the issue in *Aptus I* related to the default by Mr. Lin of his contract with the Government, while the issue in *Aptus II* involved the completion of the contract by L & S Electric. Mr. Lin argues that the facts that resulted in the

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[1] Mr. Lin's brief makes numerous references to materials and documents that were not part of the record before the United States Court of Federal Claims. This court will not consider arguments and evidence not raised before the Court of Federal Claims.

Aptus II allegations were not learned until June 23, 2003 and thus the time period covered by the two claims are different. *Aptus I* involved the time during which Mr. Lin worked on the contract before he defaulted, while *Aptus II* involves the time after the default in which L & S completed the project. Mr. Lin cites *Florida Power & Light Company v. United States*, 198 F.3d 1358 (Fed. Cir. 1999), as support for his argument that his claims are not barred by claim preclusion. There, this court explained that the modern rules of federal practice do not require a plaintiff to supplement a complaint to add a later discovered claim after an initial law suit is filed. 198 F.3d at 1360-61. However, in *Florida Power*, the trial court went on to determine that *res judicata* [claim preclusion] did not apply because the claims were significantly different. *Id.* Specifically, the court held that "[t]he two sets of claims involv[ed] not only different time periods, but also different agencies, with different statutory mandates regarding pricing policies. . . . [which] at least call for a different legal analysis." *Id.* at 1361. This court disagrees with Mr. Lin. As found by the trial court, these claims resulted from the same transactional events. All of these claims are a direct result of Mr. Lin's default of a contract which was the issue squarely before the trial court and this court in *Aptus I*. Thus, this court affirms the trial court's dismissal of Mr. Lin's Claims I-IV as barred by the doctrine of claim preclusion.

Finally, the trial court dismissed Mr. Lin's fifth claim alleging a violation of the Assignment of Claims Act, of 1940, 31 U.S.C. § 3727, 41 U.S.C. § 15. Mr. Lin alleges that these provisions were violated by the Government assigning his rights to Chatham because at the time of this transfer, Chatham was not an acceptable federal surety. *Aptus II*, slip op. at 4. The trial court held that it lacked subject matter jurisdiction over this claim because Mr. Lin failed to identify any money –mandating provision of either 31 U.S.C. § 3727 or 41 U.S.C. § 15. *Id.*

This court agrees. 31 U.S.C. § 3727 sets forth

guidelines for the assignment of claims against the Government. 41 U.S.C § 15 constrains contractors with Government contracts from transferring their work to another party. There are no money-mandating requirements in either of these provisions. As this is a requirement for the Court of Federal Claims to possess jurisdiction, the trial court correctly dismissed Mr. Lin's fifth claim under Rule 12(h)(3). That requirement was not met by Mr. Lin's claim. Thus, this court affirms the Court of Federal Claims decision.

In the United States Court of Federal Claims

No. 05-106C
Filed June 27, 2005

APTUS COMPANY,
Plaintiff,
v
THE UNITED STATES
Defendant.

Emanuel Lin, a sole proprietor doing business as Aptus Company, *pro se*, for plaintiff.

Andrew P. Averbach, Trial Attorney, Todd M. Hughes, Assistant Director, David M. Cohen, Director, Peter D. Keisler, Assistant Attorney General, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

GEORGE W. MILLER, Judge.

This matter is before the Court on defendant's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. Oral argument was deemed unnecessary. For the reasons set forth below, defendant's motion is GRANTED as to Counts I-IV of plaintiff's complaint, and Count V is dismissed pursuant to Rule 12(h)(3) of the Rules of the Court of Federal Claims ("RCFC").

BACKGROUND[1]

[1] The recitation of facts in this section does not constitute findings by the Court. All of the stated facts are either

On November 5, 1998, plaintiff was awarded a contract by the United States Army Corps of Engineers ("USACE") to upgrade equipment at a hydroelectric power plant in Sault Ste. Marie, Michigan.[2] Compl. ¶ 1. The contract was terminated for default by defendant on June 26, 2000. *Id.* ¶ 3. Following plaintiff's termination for default and pursuant to a performance bond furnished by plaintiff prior to the award of the contract, defendant demanded performance of the remaining work required under the contract from plaintiff's surety, Chatham Reinsurance Corp. ("Chatham"). *Id.* ¶ 4. On September 8, 2000, defendant and Chatham executed a Tender Agreement for L & S Electric, Inc. ("L & S") to complete the work required by the contract. *Id.* ¶ 5. Under the terms of the Tender Agreement, Chatham agreed to pay defendant $188,887. *Id.* ¶ 6. This sum represented the difference between the amount defendant was to pay to L & S and the amount to be paid under the original contract with plaintiff. *Id.* ¶ 9. Chatham subsequently sued plaintiff in Texas state court to recover the $188,887, and obtained a judgment in the amount of $205,559.50. Compl. ¶¶ 11-12. Plaintiff later secured a release from Chatham upon payment of $175,000. *Id.* ¶ 13.

In a prior and directly related case decided by Judge Gibson on August 30, 2004, plaintiff asserted five separate counts against the defendant related to the June 26, 2000 termination for default. *Aptus Company v. United States*, 61 Fed. Cl. 638 (2004) ("*Aptus I*"). In its amended complaint, filed on August 6, 2001,[3] plaintiff alleged that the defendant was liable for 1) wrongful termination of contract ("Count 1"), 2) breach of contract ("Count 2"), 3) changes made to the contract

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undisputed or alleged and assumed to be true for the purposes of the pending motion.

[2] No. DACW35-99-C-0001

[3] Plaintiff's original complaint in *Aptus I* was filed on June 18, 2001.

("Count 3"), 4) violations of federal suretyship law ("Count 4"), and 5) compensation for unjust enrichment ("Count 5"). *Id.* at 640.

On June 23, 2003, more than two years after plaintiff's original complaint was filed in *Aptus I*, plaintiff apparently became aware of additional information relating to the contract and the default termination. Pl's Opp. Def's Mot. Dismiss at 6-7. On October 16, 2003, plaintiff moved for leave to file a second amended complaint in which it attempted to assert the additional claims based upon the newly discovered information. *Id.* Plaintiff's motion for leave to file a second amended complaint was denied on October 30, 2003. *Id.* On March 2, 2004, the court denied a renewed motion by plaintiff to amend the complaint. *Id.*

After a two-week trial based on the counts asserted in plaintiff's August 6, 2001 amended complaint, Judge Gibson held that Count 2 and Count 5 were merely redundant statements of Count 1 and were thus merged with and subsumed by Count 1. *Aptus I*, 61 Fed. Cl. at 640. The court ruled in favor of the Government on Count 1. *Id.* at 664. Judge Gibson then turned to Count 4, plaintiff's claim against the Government for violations of federal suretyship law. As a basis for relief in Count 4, plaintiff relied on a published decision[4] of the United States Department of the Treasury, which revoked the Certificate of Authority previously issued to Chatham pursuant to 31 U.S.C. §§ 9304-9308 (2000).[5] *Id.* at 645. Plaintiff alleged that because the contracting officer had accepted Chatham as a surety in violation of this instruction, defendant had therefore violated federal suretyship law. *Id.* In examining whether the court had jurisdiction over this claim, Judge Gibson found that the suretyship provisions at

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[4] 65 Fed. Reg. 78 at 21,603 (March 31, 2000).

[5] Sections 9304-9308 of Title 31 authorize the acceptance of corporate surety companies on bonds given to the United States.

issue did not contain a "money-mandating provision" as required by the Tucker Act, 28 U.S.C. § 1491 (2000). *Id.* Judge Gibson therefore dismissed Count 4 for lack of jurisdiction pursuant to RCFC 12(b)(1). *Id.* With respect to plaintiff's only remaining claim against the Government, Count 3, the court ruled in favor of the Government, finding no valid basis for plaintiff's claim against the defendant for changes made to the contract. *Id.* at 664.

On January 12, 2005, plaintiff filed a new complaint with the United States Court of Federal Claims. This complaint sets forth the claims that plaintiff attempted to advance in *Aptus I*, but was unable to pursue in that case because its motion for leave to amend its second amended complaint was denied. *See* Pl's Opp. Def's Mot. Dismiss at 6-7. In its complaint in this action, plaintiff alleges that 1) plaintiff should not be liable for the $7,500 increase in the cost in optional hiring of skilled craftsmen under the L & S contract; 2) various items for which damages had been claimed and paid have not been performed by L & S, therefore L & S should not have been paid in full; 3) the damages set forth in the Tender Agreement were invalidated as the completion contract proceeded forward because of various modifications to the contract; 4) defendant acquiesced in L & S's failure to remedy certain deficiencies which contributed to defendant's decision to terminate plaintiff's contract for default; 5) assignment of plaintiff's interests in the original contract, first to Chatham and then to L & S, violated 31 U.S.C. § 3727 (2000) and 41 U.S.C. § 15 (2000) because Chatham's Certificate of Authority as an acceptable federal surety had been revoked.

On March 14, 2005, defendant responded to plaintiff's complaint with a motion to dismiss for failure to state a claim upon which relief can be granted. In its motion to dismiss defendant argued that plaintiff had not pleaded facts sufficient to set forth a basis for relief and that, to the extent that it had done so, plaintiff's claims were barred by the doctrine of *res judicata* or claim preclusion. On April 8, 2005, plaintiff filed

its opposition to defendant's motion. On April 18, 2005, defendant filed a reply.

DISCUSSION

I. Jurisdiction of the Court

The subject matter jurisdiction of United States Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491, extends to "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Additionally, plaintiff's "asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for damage sustained.'" *United States v. Testan*, 424 U.S. 392, 400 (1976) (citations omitted). Those claims for which plaintiff does not establish a "money-mandating" provision are subject to RCFC 12(h)(3), which provides that "whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

II. The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claim Based on the Assignment of Claims Act

In *Aptus I*, plaintiff asserted that because the contracting officer had accepted Chatham as a surety, defendant violated 31 U.S.C. §§ 9304-9308, and was thus liable to plaintiff. *Aptus I*, 61 Fed. Cl. at 645. That claim was dismissed by the court pursuant to RCFC 12(b)(1) because 31 U.S.C. §§ 9304-9308 did not contain a "money-mandating provision," and thus the court did not have jurisdiction pursuant to the Tucker Act. *Id.*

Plaintiff now alleges in Count V of its complaint that "[a]ssignment of plaintiff's interests in the original contract by

the defendant first to Chatham Reinsurance Corporation then to L & S Electric violates the Assignment of Claims Act of 1940, 31 U.S.C. § 3727, 41 U.S.C. § 15." Compl. ¶ 31. Like the claim advanced by plaintiff in *Aptus I*, the suretyship claim asserted in this case is brought under statutes that do not constitute money-mandating provisions. Rather, both statutes have been interpreted by the courts to be for the protection of the Government. *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369 (1945) ("The provisions of the statute governing assignment of claims against the Government [formerly 31 U.S.C. § 203, currently 31 U.S.C. § 3727] are for the protection of the Government."); *G.L. Christian & Assocs. v. United States*, 160 Ct. Cl. 1, 312 F.2d 418, 422-23 (1963) ("the Anti-Assignment Act . . .[,] 41 U.S.C. § 15[,] . . . has . . . been interpreted as being solely for the Government's own benefit."). Because the statutes relied upon by plaintiff provide only for the protection of the Government, plaintiff has not identified a money-mandating provision upon which to base the claim set forth in Count V of its complaint. Thus, this Court lacks subject matter jurisdiction. The Court therefore dismisses that claim pursuant to RCFC 12(h)(3).

III. Standard of Review for Motion To Dismiss

Dismissal under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted is appropriate when the facts as alleged in the complaint do not entitle the plaintiff to a legal remedy. *New York Life Ins. Co. v. United States*, 190 F.3d 1372, 1377 (Fed. Cir. 1999). In reviewing a motion to dismiss, the court accepts all well-pleaded factual allegations as true, and draws all reasonable inferences in favor of the plaintiff. *Perez v. United States*, 156 F.3d 1366, 1370 (Fed. Cir. 1998). The case may be properly dismissed, however, if the plaintiff "can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002) (quoting *Conely*, 355 U.S. at 45-46). The basis for defendant's motion to dismiss is that plaintiff's

remaining claims are barred by the doctrine of claim preclusion. "A claim preclusion defense is appropriately considered as a motion to dismiss pursuant to RCFC 12(b)(4) [currently RCFC 12(b)(6)]." *Lyons v. United States*, 45 Fed. Cl. 399, 402-03 (1999).

A *pro se* plaintiff is held to a less stringent standard than one represented by counsel. *Bernard v. United States*, 59 Fed. Cl. 497, 500 (2004). Though a plaintiff's *pro se* status may excuse the ambiguities in a plaintiff's complaint, it does not excuse the failures, if such there be. *Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995). The court may strain its proper role in adversarial proceedings in searching the complaint for facts that might possibly be construed to state a cause of action. *Ruderer v. United States*, 188 Ct. Cl. 456, 468, 412 F.2d 1285, 1292 (1969). The court should interpret a *pro se* plaintiff's complaint liberally, but, nonetheless, a plaintiff must present some set of facts upon which a claim for relief can be based. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

IV. Plaintiff's Remaining Claims Are Barred by the Doctrine of Claim Preclusion

The doctrine of "claim preclusion is a threshold issue that must be addressed before the court can consider the [plaintiff's arguments] . . . ." *Hallco Mfg. Co. v. Foster*, 256 F.3d 1290, 1298 (Fed. Cir. 2001). Claim preclusion forecloses matters that, although never litigated or even raised, could have been advanced in an earlier suit. *Carson v. Department of Energy*, 398 F.3d 1369, 1375 (Fed. Cir. 2005) (citations omitted). Under this doctrine, "a second suit will be barred by claim preclusion if (1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first." *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000) (citations omitted). "Moreover, the law is well settled that the pendency

of an appeal has no affect [sic] on the finality or binding effect of a trial court's holding." *Ssih Equip. S.A. v. United States Int'l Trade Comm'n*, 718 F.2d 365, 370 (Fed. Cir. 1983) (citing *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903)).

Here, each element of the doctrine of claim preclusion is met. Identity of parties is established by the fact that both *Aptus I* and this action involve the exact same parties. The second element is established because an adjudication on the merits results from any dismissal unless the court orders otherwise or the case is dismissed for lack of jurisdiction or a failure to join a party. RCFC 41(b). *Aptus I*, which was decided after trial, therefore, constitutes an earlier adjudication on the merits. 61 Fed. Cl. at 664. The Federal Circuit has adopted a transactional analysis in determining whether the third element of claim preclusion has been established. *See Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 478-79 (Fed. Cir. 1991). Claim preclusion will extinguish "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions, out of which the action arose." *Id.* at 478 (citing RESTATEMENT (SECOND) OF JUDGMENTS, § 24(1)). Plaintiff's complaint is based on the same transactional facts as those of *Aptus I*. All claims in each action arise out of plaintiff's entry into a contract with defendant, plaintiff's termination for default, and subsequent performance of the contract by plaintiff's surety. Therefore, each claim asserted by plaintiff in this action should have been brought in *Aptus I*.

Plaintiff argues that its "second set of claims aris[e] out of the newly discovered transactional facts . . . " that were discovered on June 23, 2003. Pl's Opp. Df's Mot. Dismiss at 7. The claims plaintiff sought to add to *Aptus I* are the same claims upon which plaintiff seeks relief in this case. *See id.* (stating that "the court denied APTUS' motions aimed at merging the instant cause of action to APTUS1 . . . ."). Plaintiff argues that claim preclusion cannot apply because its motion to amend the complaint in *Aptus I* was denied by the

court, which prevented plaintiff from asserting its new claims, and therefore if its claims are precluded here, it will not have had a "full and fair opportunity to litigate" its claims. *Id.* However, "[i]t is immaterial that the plaintiff in the first action sought to prove the acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came too late." RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. b. Rather than wait until the conclusion of *Aptus I* and file another suit, plaintiff's "proper recourse was to appeal from the denial of his motion to amend." *Sendi v. NCR Comten, Inc.*, 624 F. Supp. 1205, 1207 (E.D. Pa. 1986) (citing *Poe v. John Deere Co.*, 695 F.2d 1103, 1107 (8th Cir. 1982), *Eliason Corp. v. Bureau of Safety and Regulation*, 564 F.Supp. 1298, 1303-04 (W.D.Mich. 1983)); *see also Huck v. Dawson*, 106 F.3d 45, 49 (3d Cir. 1997).

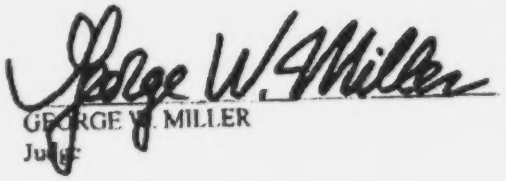
Plaintiff has filed an appeal to the United States Court of Appeals for the Federal Circuit from the judgment in *Aptus I. Lin v. United States*, No. 05-5030. However, in that appeal, plaintiff has not challenged the court's decision in *Aptus I* to deny plaintiff leave to amend its complaint. *See* Appellant's Corr. Br. at 1, *Lin*, No. 05-5030; Def's Reply at 3. Plaintiff's proper remedy for the denial of its motion for leave to file its second amended complaint in *Aptus I* was to appeal the denial of that motion, not to file this second action. Accordingly, each of plaintiff's remaining claims is barred by the doctrine of claim preclusion. Defendant's motion to dismiss pursuant to RCFC 12(b)(6) is therefore granted with respect to plaintiff's remaining claims, which are set forth in Counts I-IV of plaintiff's complaint.

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss pursuant to RCFC 12(b)(6) is GRANTED as to Counts I-IV of plaintiff's complaint, and Count V is dismissed pursuant to RCFC 12(h)(3). The Clerk is directed to enter judgment dismissing plaintiff's complaint in accordance

with this Opinion and Order.

IT IS SO ORDERED



GEORGE W. MILLER
Judge

41 U. S. C. § 605. - *Decision by contracting officer*

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

48 CFR 49.404 *Surety-takeover agreement*

(a) The procedures in this section apply primarily, but not solely, to fixed-price construction contracts terminated for default.

(b) Since the surety is liable for damages resulting from the contractor's default, the surety has certain rights and interests in the completion of the contract work and application of any undisbursed funds. Therefore, the contracting officer must consider carefully the surety's proposals for completing the contract. The contracting officer must take action on the basis of the Government's interest, including the possible effect upon the Government's rights against the surety.

(c) The contracting officer should permit surety offers to complete the contract, unless the contracting officer believes that the persons or firms proposed by the surety to complete the work are not competent and qualified or the proposal is not in the best interest of the Government.

(d) There may be conflicting demands for the defaulting contractor's assets, including unpaid prior earnings (retained percentages and unpaid progress estimates). Therefore, the surety may include a "takeover" agreement in its proposal, fixing the surety's rights to payment from those funds. The contracting officer may (but not before the effective date of termination) enter into a written agreement with the surety. The contracting officer should consider using a tripartite agreement among the Government, the surety, and the defaulting contractor to resolve the defaulting contractor's residual rights, including assertions to unpaid prior earnings.

(e) Any takeover agreement must require the surety to complete the contract and the Government to pay the surety's costs and expenses up to the balance of the contract price unpaid at the time of default, subject to the following conditions:

(1) Any unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished before termination, must be subject to debts due the Government by the contractor, except to the extent that the unpaid earnings may be

used to pay the completing surety its actual costs and expenses incurred in the completion of the work, but not including its payments and obligations under the payment bond given in connection with the contract.

(2) The surety is bound by contract terms governing liquidated damages for delays in completion of the work, unless the delays are excusable under the contract.

(3) If the contract proceeds have been assigned to a financing institution, the surety must not be paid from unpaid earnings, unless the assignee provides written consent.

(4) The contracting officer must not pay the surety more than the amount it expended completing the work and discharging its liabilities under the defaulting contractor's payment bond. Payments to the surety to reimburse it for discharging its liabilities under the payment bond of the defaulting contractor must be only on authority of—

(i) Mutual agreement among the Government, the defaulting contractor, and the surety;

(ii) Determination of the Comptroller General as to payee and amount; or

(iii) Order of a court of competent jurisdiction.

In the United States Court of Federal Claims

No. 05 – 106C

APTUS Company	§	
Plaintiff	§	
v.	§	Contract – Construction
THE UNITED STATES	§	(CDA)
Defendant	§	

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGES OF THE COURT,

COMES NOW Plaintiff S. Emanuel Lin, an individual doing business as APTUS Company, and files this *Plaintiff's Original Complaint* and would respectfully show onto the Court as follows:

1. On November 5, 1998, U. S. Army Corps of Engineers, District Detroit, awarded plaintiff APTUS Company a $1,265,110.00 construction contract (No. DACW35-99-C-0001) for the installation of various equipment to upgrade a revenue-producing hydropower plant in Sault Saint Marie, Michigan with recent computer technology.

2. Due to inadvertent exercise of optional hiring of skilled craftsmen for a cost of $40,000 at contract line item number (CLIN) 16, the original contract was reduced to $1,225,110 through written contract modification P00002 on January 21, 1999.

3. Notice to proceed was issued to and acknowledged by plaintiff on December 9, 1998. After 565 contract days, defendant terminated the contract for default on June 26, 2000 and demanded Chatham Reinsurance Corporation to take over the contract under a performance bond (No. H00530) it had submitted to and approved by the defendant on December 14, 1998.

4. Upon termination of the said contract for default on June 26, 2000, defendant demanded the performance of

Chatham Reinsurance Corporation under a performance bond (No. H00530) submitted to and approved by the defendant on December 14, 1998.

5. On September 8, 2000, defendant and Chatham Reinsurance Corporation executed a Tender Agreement for L&S Electric Inc. of Schofield, Wisconsin to complete the contract at $1,350,000 plus $47,500 for the optional hiring of skilled craftsmen at CLIN 16.

6. Upon receiving the payment of $188,887 (Chatham's check no. 002593 dated September 25, 2000) on or around September 29, 2000, defendant, per paragraph 2 of the Tender Agreement on page 3, represents:

> " [t]he Corps hereby fully and finally releases and forever discharges the Surety from and against any and all claims, demands, obligations and causes of action, of whatever nature, which the Corps had, has or may ever have against the Surety arising out of or in any way relating to APTUS Company's performance of or failure to timely and properly perform or complete the Contract, ..." (paragraph 2, page 3 of the Tender Agreement)

7. On May 1, 2000, defendant made its claims known to Chatham by furnishing a copy of *Show Cause Notice* and its enclosed report entitled "*Report – Evaluation of the Contract Performance for the APTUS Company*" produced by Hydroelectric Design Center in April 2000. Examples of the claims therein are: the use of half inch conduit, the use of roller-type pipe cutter, the use of THHN wire, violation of National Electric Code, the use of foreign-sourced pipe fittings, insufficient or no application of conduit joint compound, damage to the surface of rigid steel conduit, and over tightening of conduit into its coupling. Other claims, such as violations of Buy American Act and Davis Bacon Act, had also been levied against plaintiff during its contract tenure.

8. On July 13, 2000, plaintiff met representatives of L&S Electric at its office in Schofield, Wisconsin and briefed them the state of plaintiff's performance leading to the default termination. Plaintiff also accepted their request to copy a set of plaintiff's complete submittals. During L&S' first site survey on July 17, 2000, defendant also made in writing the correction of plaintiff's non-conforming work a specific requirement to L&S' estimator and application manager, Mr. Ron Hohn.

9. Chatham's payment of $188,887 represents a $181,387 shortfall in the remaining contract fund of $1,158,613 as of the date of default termination to settle all claims liquidated at $1,350,000 as of the date of Tender Agreement, plus an increase of $7,500 for the optional hiring of skilled craftsmen at $47,500 at CLIN 16 in L&S Electric's proposal of September 7, 2000.

10. In accordance with paragraph 5 of the Tender Agreement on page 3, defendant further represents:

> " ... the Corps hereby expressly assigns and transfers to Surety, and subrogates Surety to, all claims, demands, causes of action, rights and equities which the Corps had, has or may ever have against APTUS Company arising out of, in any way relating to or evidenced by its Contract with APTUS Company, and agrees that the Surety may pursue such claims, demands, causes of action, rights and equities as the Surety deems advisable."

11. On November 2, 2000, Chatham filed a breach-of-indemnity agreement lawsuit against plaintiff and Mrs. Lin in 189th District Court of Harris County, Texas (*Chatham Reinsurance Corporation v. Shihche E. Lin, individually and dba APTUS Company and Sung-Ping H. Lin,* Cause No. 2000-56702) to recover the loss of $188,887 plus other costs it had incurred under its performance bond (No. H00530).

12. On July 22, 2002, 189th District Court of Harris County, Texas granted a motion for summary judgment for Mapfre Reinsurance Corporation, f/k/a Chatham Reinsurance Corporation, in the total amount of $205,559.50 and the judgment became final on September 16, 2002.

13. Upon the payment of $175,000 in two installments, plaintiff secured from Chatham a *Release of Judgment* and filed the same on January 15, 2003. With the equity of 565 days of performance valued at approximately $700,000 and the said un-compensated loss of $175,000, plaintiff, as the principal of the performance bond, is a party of interests to the Tender Agreement entered between the defendant and Chatham on September 8, 2000.

14. By written contract modification P00012 dated June 19, 2001, defendant assigned the contract (No. DACW35-99-C-0001) originally awarded to plaintiff on November 5, 1998 to L&S Electric Inc. of Schofield, Wisconsin.

15. Detailed fulfillment of defendant's claims against plaintiff's performance bond was not made known to plaintiff until approximately 2,500 pages of document and some 220 photos on the state of L&S' installation were produced and received after a joint site visit in the week of June 23, 2003. Defendant was furnished with a set of the said photos in true color with each labeled in the back as, say "C13" for frame number 13 in the film negative C.

16. Upon research of the newly discovered document and L&S' installation photos, plaintiff submitted to contracting officer on October 9, 2003 a claim of entitlement of $900,000 to offset the total damages of $1,397,500 liquidated in the Tender Agreement of September 8, 2000.

17. Contracting officer denied the said claim on January 15, 2004. In the instant appeal, plaintiff would respectfully show the court at least the following categories of grounds:

I

18. $7,500 increase for the cost of optional hiring of skilled craftsmen at L&S' CLIN 16 should not have been part of damage claim. The said option was not awarded nor exercised in plaintiff's original contract. Plaintiff could not be held liable for something uncertain at the time of Tender Agreement.

19. If plaintiff were held liable for such option, it was not exercised in the completion contract in accordance with the contract specification in Amendment 0007 to solicitation dated 10 September 1998 at page 01025-5. Defendant exercised the option at CLIN 16 for L&S' refurbishment of generator brake at Unit 10 through contract modification P00020 while such increase in cost should have been accounted for in CLIN 0009 in accordance with Amendment 0004 to solicitation dated 26 August 1998 at page 01025-4.

II

20. Completion contract had failed to perform various contract requirements that damages had been claimed and paid for through the Tender Agreement of September 8, 2000.

21. Plaintiff noticed during his site visit in the week of June 23, 2003 that shaft-mounted rotating parts on the respective main exciter for Units 1, 2, 3 and Unit 10, and poles affixed to its respective casing were not removed in accordance with Amendment 0007 to the solicitation. (*See* photos D1 for Unit 2, G22 for Unit 10, K23). Abandoned wires in the main exciter for all generator units were not removed per contract specification. (*See* photos K24, J3, D12)

22. 2" rigid steel conduits used to carry the DC current from ABB's rectifier unit to respective generator Units 1, 2 and 3 failed to meet National Electric Code. In the beginning, completion contractor ran two 4/0 RHH type cable (*See* photo C7) in the said 2" conduit (*See* photo D0). When these two cables failed to provide sufficient capacity to deliver the needed DC current to "excite" the generator for a normal

power generation, a third one was pulled through the same conduit. These three 4/0 RHH cables have a total cross section of 3x0.4754, or 1.4262 square inches. It exceeds 40% of the cross section area, or 1.363 square inches, of a 2" rigid steel conduit. (*See* Tables 4 and 5 on pages 968 and 969 of 1999 National Electrical Code) As a result, the conduit was exceedingly warm, but it was too late and too costly in labor and in time to up-size all the said categories of DC conduits and disturb all the DC+ and DC- cables to generator Units 1, 2 and 3 already in place.

23. Completion contract failed to meet the requirement set forth in paragraph *1.22.1 Coordination* of the contract at 01100-10:

> Work activities shall be planned and scheduled so that all work, installation, wiring, auxiliary devices, operational testing, and repair of malfunctioning equipment does not cause any one of the five generators to be out of service for a total of twenty-one (21) calendar days.

24. Other examples in this categories for the non-performance of the original contract are the Unit 10 transformer cabinet design (*See* photo G11), the failure to use back plate in securing a rigid steel conduit (*See* photos I18, I20), the use of non-ferrous concrete anchor to secure the conduit support (*See* photo J10 and contract specification at 16050-45), clamping of the conduit without clamp back (*See* photos I18, I20 and contract specification at paragraph d at 16050-46), failure to observe HDC Electrical Standard No. 14 on conduit spacing (*See* photo J24), failure to run a group of two or more conduits by means of a common support. (*See* photos L8, L9 and contract specification at paragraph d at 16050-46)

III

25. This category of setoff rests on the ground that damages set forth in the Tender Agreement on September 8, 2000 were invalidated as the completion contract proceeded

forward. The invalidation is evidenced in L&S' contract modifications.

26. One example of this invalidated damage claim is the provision of fuse cubicle for Unit 3A's static excitation. It was originally claimed to be the responsibility of plaintiff's as evidenced in the third paragraph of an e-mail sent to plaintiff from contracting officer's representative, Mr. Peach, dated "Sat, 8 Apr 2000 09:40:08" on the subject of "New Fuse Cubicle" as follows:

"3. The cubicle is an Aptus responsibility. . . ."

Defendant later decided otherwise and issued L&S contract modification P00024 dated June 27, 2002 to furnish the said item at a cost of $3,172.00.

27. Another example in this category of damage pertains to defendant's claim of damage for plaintiff's use of roller type cutter to cut electrical conduit. In an evaluation report by Hydroelectric Design Center in April 2000 on plaintiff's contract performance, government was in the position that such conduit should have been cut with a hacksaw. Such operation is time consuming and labor intensive, and subsequently very costly. Plaintiff is entitled to a setoff to the original damage set forth in the Tender Agreement on September 8, 2000 from the substantial saving in abolishing such practice through L&S' contract modification P00023 signed June 6, 2002.

28. Third example for plaintiff's entitlement for setoff centers around defendant's payment to L&S to furnish various generator protective relays and generator winding monitor at Unit 10.

IV

29. This category of setoff is based on defendant's harboring in the completion contract those circumstances resulting in a damage claim at the time of Tender Agreement.

30. Examples of this type of setoff can be found in the continual use and storage of the alleged THHN wires (*See* photo C19), the use of half inch conduit (*See* photo I12), the use of foreign-sourced pipe fitting without certain laboratory's seal of approval and as to the violation of Buy American Act (*See* photos I10, I22).

V

31. Assignment of plaintiff's interests in the original contract by the defendant first to Chatham Reinsurance Corporation then to L&S Electric violates the *Assignment of Claims Act of 1940*, 31 U.S.C. §3727, 41 U.S.C. §15.

32. When Tender Agreement was executed on September 8, 2000, Chatham's Certificate of Authority as an acceptable federal surety had been revoked for more than five months without plaintiff's knowledge. By the operation of the law, its performance bond (H00530) became void and null as of March 31, 2000. Since surety contract can not be implied, a new surety was required to furnish a new bond in accordance with the contract specification. Clearly, L&S Electric has never been in surety business and can not serve as a surety.

DEMAND FOR JUDGMENT

33. WHEREFORE, PREMISES CONSIDERED, Plaintiff APTUS Company prays for a judgment for a setoff in the amount of $850,000 with interest, along with attorney's fees, costs of court, and all other relief both legal and equitable as this Court deems proper.

Respectfully submitted,

Dated: Tuesday January 11, 2005

S. Emanuel Lin, *pro se*
3527 Woodvalley Drive
Houston, Texas 77025-4232
Phone & fax: (713) 666-3816

In the United States Court of Federal Claims

No. 01-362C

APTUS Company, *Plaintiff.*	) Judge Wilson) Construction Contract:
v.	) Wrongful Termination,
THE UNITED STATES, *Defendant.*	) Breach of Contract,) Breach of Suretyship Law,) Unjust Enrichment.

PLAINTIFF'S FIRST AMENDED PETITION

TO THE HONORABLE JUDGES OF THE COURT,

COMES NOW Plaintiff APTUS Company (APTUS) in its natural person and sole proprietor, S. Emanuel Lin, and files this *Plaintiff's First Amended Petition* and would respectfully show onto the Court as follows:

JURISDITION

1. On November 5, 1998, the United States through its Contracting Officer Mr. George Fedynsky (Phone: 313-226-6356) of U. S. Army Corps of Engineers, District Detroit, awarded a contract (No. DACW35-99-C-0001) to an individual and a sole proprietor, S. Emanuel Lin, through his "dba" name, APTUS Company as established in the contractor's representation submitted with the offer. The contract was valued at $1,265,110 for the installation of power plant automation equipment at a hydro power plant in St. Mary's Fall in Sault Ste. Marie, Michigan.

2. After 570 days of performance, Contracting Officer terminated the said contract for default on June 30, 2000. The final decision was received by APTUS on July 6, 2000. On June 7, 2001, Contracting Officer denied APTUS' certified claim for equitable adjustment and relief in the amount of $916,050.02. Responding to each and every such adverse de-

cisions, APTUS filed its *Plaintiff's Original Complaint* through its natural person and sole proprietor, S. Emanuel Lin, on June 18, 2001 in pursuant with the *Contract Dispute Act* of 1978, 41 U.S.C. §§601~612 (1994 & Sup. IV 1998). The jurisdiction of this Court rests upon 41 U.S.C. §609(a).

COMPLAINTS

I

Wrongful Termination

3. The termination was wrongful as the Contracting Officer acted outside FAR 52.249-10 *Default (Fixed-Price Construction)*. The clause affords the Contracting Officer "to terminate the right to proceed with the work (or separable part of the work) that has been delayed". Yet such delay was never found in either Contracting Officer's final decision or APTUS' contract performance.

4. To the contrary, Government's delay in furnishing governor equipment suitable for field installation had stalled the effective contract performance. The impropriety is especially evident in Government's failure to deliver as of the date of default termination any SCADA property for contractor's performance.

5. Termination of those portions of the contract yet to be performed or not yet delayed by the contractor is outside the *Default* clause of a construction contract.

6. While being deprived of Government-furnished property for effective preparation and execution of the remaining contract, APTUS had taken measure to mitigate the increased costs to the contract resulting from such delay and interruption. In the meantime, APTUS had remained able and ready to continue performing with its own force and through resources readily available in the construction and engineering industries.

7. Termination of a contract for default on Government's alleged unsatisfactory performance is not founded un-

der the terms of the contract. Government's un-met demands for APTUS' performance outside the requirements of the contract were the part of causes of such wrongful termination.

8. Termination of a contract for default on the size of APTUS' organization beyond the contract requirement is wrongful. A construction contract can only be terminated for default for a contractor's lack of performance in meeting a contract completion time. A contractor's organization does not equate to its contract performance.

9. In compliance with the contract clause FAR 52.236-1 *Performance of Work by the Contractor*, APTUS had performed on the site, and with its own organization, work equivalent to at least twenty (20) percent of the total amount of work to be performed under the contract. APTUS had never not sought supplemental agreement to have this percentage reduced. Equating a large organization to the existence of "expert engineering" deprives APTUS of its fair performance evaluation.

10. Without expert engineering or ability to acquire the same, APTUS would not have caused the redesigns and remanufacturing of the governor speed sensor brackets, the governor speed disc, the new Unit 10 governor assembly's anchoring bolts, and governor gate position sensing assembly.

11. Termination of a contract based on alleged failure to build up an organization for those portions of the contract whose performance is remote and indefinite vests Contracting Officer no authority to act under the *Default* clause.

12. APTUS had carried out its initial intention to acquire the outside assistance vaguely perceived necessary for the contract. Despite a letter of intent to act or refrain from acting is legally non-binding, APTUS had extended an offer to hire Mr. Richard York pending his completion of a project at the Strom Thurmond power plant. For the lack of a personal interview, APTUS was unable to ascertain the extent of Mr.

York's skill and thus made no representation of him as "an expert" to anyone.

13. Mr. York declined the offer via a fax dated and received on October 12, 1998 around 10:07 a.m. ET. Nevertheless, the fax indicates that he would "give further consideration" should APTUS "be unsuccessful in completing a staff for the Sault Ste. Marie project". The timing also turned out unfavorable, as Mr. York didn't complete the Thurmond project until July 1999.

14. Fulfilling its initial intention to build up an organization for the contract, APTUS had begun its first wave of recruitment prior to its contract award. Such efforts were made in anticipation of the possible delivery of governor and exciter equipment in January 1999 as stated in the contract (page 01100-4). APTUS visited Kiser-Johnson and hired in January 1999 a mechanical engineer and an electrician's journeyman 150 hours away from taking Michigan's electrician's license. The equipment never came as promised, and the recruitment effort was frustrated.

15. Beginning in December 1999, APTUS started second wave of recruitment and received the assistance of Mr. Yuriy Dubinin for his expertise in generator disassembly and exciter modification. Mr. Dubinin further assisted in the installation of governor equipment and identified the kinematics problem in the governor gate position sensing assembly. With the service of Mr. Dubinin, APTUS has lived up its pre-award representation to the Contracting Officer for the acquisition of expertise that would had presumably come from Kiser-Johnson and Duke Energy.

16. Government's failure to deliver governor property suitable for its use again frustrated APTUS' second wave of recruitment effort and its contract.

17. Termination of a contract based on alleged labor violation fails to follow the labor dispute procedure set out in FAR 52.222-14 *Disputes Concerning Labor Standards*. This

Court has yet to acquire its jurisdiction over the matter. Upon review of Davis-Bacon Act after the default termination, APTUS found its prior classification of "Logistic Support" fell closely within the definition of a "Helper" in 29 CFR §5.2(n)(4). Lacking "Helper" classification in the contract and not knowing its common reference in CFR, APTUS requested a new job classification in good faith in accordance with the rule. After searching long and hard for a good cause beyond the unrelenting controversies, APTUS paid on its own motion the helpers generously. It has been APTUS' belief that it had paid its workers a prevailing wage.

II

Government's Breach of Contract

18. In the course of a planned equipment installation, APTUS found on February 24, 2000 the condition of Government-furnished governor property unsuitable for the intended use. Upon written notification in contractor's daily construction report of the said conditions and its severe impact in delaying the contract performance, the Government failed to repair or replace the defective parts with firm delivery dates. The governor property was to be furnished to APTUS as early as January 1999 in accordance with the contract. As of June 30, 2000 when the contract was terminated, their delivery date was still unknown.

19. Similarly, the SCADA property was to be furnished for contractor's performance as early as August 1999 under the contract. Despite APTUS' in depth experience in the design and the installation of SCADA system, none was delivered even on the date of default termination.

20. In breaching that portion of the contract in paragraph (h) of contract clause FAR 52.245-2 *Government Property*, the Contracting Officer failed to make equitable adjustment to the contract completion time and the increased costs as provided therein through *Changes* clause.

21. Government's termination of contract for default upon allegedly finding the very first time a contractor's work not to its satisfaction is in contrary to the terms laid out in contract clause at FAR 52.246-12 *Inspection of Construction.* APTUS was willing to promptly replace or correct any work not to conform to contract requirements. APTUS believes there were only two or three pieces of work in progress fell in this category and within its responsibility to correct. Summary termination of contract for default on the quality control issues failed to follow the due process established in quality control plan. Termination of a contract on such minor infractions can not be justified, especially on its first offense, as one for default.

III

Government's Changes to the Contract

22. Government conspired and ultimately succeeded in the misuse of *Default* clause to change the manner of contract performance and to shed the increased cost of such changes upon APTUS.

23. Government was to furnish the erection engineer's service from the Government's equipment manufacturers to assist APTUS' equipment installation. In stead of rendering such assistance on its own cost under the contract to assure the successful installation of the Government-furnished equipment, Government removed APTUS from which it had received valuable assistance in identifying the faulty design and manufacturing of the governor retrofitting components.

24. Ignoring the graying of the federal agencies, particularly in those involved in the contract, Government failed to adequately maintain its organizations with qualified personnel to manage and inspect the contract. Unable to timely cure such shortage of man power, Government ultimately elected to wrongfully replace APTUS with one seemly able to do without such staffing requirement within the Government.

25. Despite APTUS' significant contributions during its shortened contract performance to the well-being of the final automated operation of the power plant at issue, such concern, however unjustified, continued to seize the contracting officials and their representatives until APTUS' removal. Such "risk avoidance" action deviates from the guiding principles of "risk management" laid out in FAR 1.102-2(2). It is clearly stated therein that the cost to the taxpayer of attempting to eliminate all risk is prohibitive. Government shall bear the increased costs in its attempt to reduce such risk regardless whether APTUS' removal would indeed be beneficial.

IV

Government's Breach of Suretyship Law

26. Prior to the contract award on November 5, 1998, APTUS furnished a performance bond listing Chatham Reinsurance Corporation (Chatham) as surety. Such performance bond was conditioned and maintained upon Chatham's holding of a valid Certificate of Authority as an acceptable federal surety.

27. On March 31, 2000, the Secretary of the United States Department of Treasury revoked Chatham's Certificate of Authority as an acceptable federal surety and instructed all bond approving officers to seek new bond.

28. Three months thereafter, upon the declaration of APTUS' default on June 30, 2000, Government wrongfully demanded exclusively the performance of the non-surety, Chatham Reinsurance Corporation. Demanding a non-surety to perform the duties of a federal surety violates federal statutes and breached the performance bond contract between the Government and APTUS Company, and caused severe damage measured at least at $916,050.02 to the latter and its sole proprietor, S. Emanuel Lin.

29. Surety's obligation to the contract is fixed upon execution of the surety bond. Surety bond embodies the principle that any material change in the bonded contract, that in-

creases the surety's risk or obligation without the surety's consent, affects the surety relationship. When the modification to the contract does not material increase the risk, the obligation of the compensated surety is reduced to the extent of loss due to the modification.

30. Applying these principles, we can fairly conclude that Government had incurred liability to the surety and the bond's principal when it failed to deliver useful governor property and any SCADA property in the entire 600-days extended contract performance time.

31. The cost of contract completion is excessive and unreasonable. Most importantly, no damage, if any, to the Government could be attributed to APTUS' performance.

V

Government's Unjust Enrichment

32. The original contract was to be completed in 450 days at a price of $1,225,000. After 570 days of contract performance under APTUS, Government terminated the contract with a total of roughly $55,000 payment to APTUS and a gain of $188,887 arising out of the performance bond furnished by APTUS. Constructively, not only did the Government receive 570 days, or roughly 3 man-years, of service from APTUS for free, it had a windfall of roughly $125,000 under its failure to deliver Government-furnished property at the time of contract termination. There exists disproportional inequity between the contracting parties and Government's unjust enrichment is obvious.

DEMAND FOR JUDGMENT

33. WHEREFORE, PREMISES CONSIDERED, Plaintiff APTUS Company prays judgment for:

- the conversion of Contracting Officer's decision for the termination of the contract for default into one for the convenience of the Government,

- the recovery with interests of increased costs in changing the contract, excessive cost in completing the contract, and Government's unjust enrichment in enforcing the contract,
- along with attorney's fees, costs of court, and all other relief both legal and equitable as this Court deems proper.

Respectfully submitted,

Dated: Monday August 6, 2001

S. Emanuel Lin, Pro se
3527 Woodvalley Drive
Houston, Texas 77025-4232
Phone & fax: (713) 666-3816

Certificate of Service

I hereby certify under the penalty of perjury that I have personally delivered a true and correct copy of the foregoing *Plaintiff's First Amended Petition* to Mr. Kevin Crawford, Trial Attorney, U. S. Department of Justice at 1100 L Street, Washington, D.C. on this sixth (6th) day of August, 2001.

S. Emanuel Lin

TENDER AGREEMENT

THIS AGREEMENT is made and entered into this __ day of September, 2000, by and between the Detroit District, U. S. Amy Corps of Engineers (hereinafter "the Corps"), and Chatham Reinsurance Corporation (hereinafter "Surety").

WITNESSETH

WHEREAS, the Corps (sometimes hereinafter referred to as the "Obligee"), on or about the 5th day of November, 1998, entered into that certain Contract No. DACW 35-09-C-0001 (hereinafter the "Contract") with Shihche E. Lin, d/b/a APTUS Company (hereinafter "APTUS Company") for thc Powerhouse Automation Installation, Sault Ste. Marie, Michigan (the "Project"), said Contract being incorporated herein by reference as if set out verbatim; and

WHEREAS, the original contract price of $1,265,110.00 has been reduced, by written modification, to $1,225,110.00 (subject to a $40,000.00 increase for the optional hiring of skilled craftsmen); and

WHEREAS, in connection with the Contract, APTUS Company, as Principal, and the Surety made, executed and delivered to the Corps, as Obligee, a Performance Bond in the original penal sum of $l,265,110.00 and a Payment Bond in the original penal sum of $506,044.00, which Performance and Payment Bonds are incorporated herein by reference as if fully set out verbatim; and

WHEREAS, the Corps declared APTUS Company in default of its obligations under the Contract and terminated its right to proceed with the work as of the 26th day of June, 2000; and

WHEREAS, during the course of the work called for under the Contract, APTUS Company, having been paid $56,497.00 by the Corps through Pay Estimate No. 2, was terminated by the Corps pursuant to the terms of sad Contract, leaving unfinished certain work called for under the Contract and potentially leaving unpaid bills for labor, equipment services and/or materials furnished to APTUS Company in connection with the Project; and

WHEREAS, the Corps has warranted to Surety that its default termination of APTUS Company was made in accordance with the terms of the Contract; and

WHEREAS, thc Corps has notified Surety of its default termi-

nation of APTUS Company and demanded that Surety satisfy its obligations under the Performance and Payment Bonds; and

WHEREAS, pursuant to the Corps' demands, and with a full and complete reservation of all of its and APTUS Company's rights, claims, remedies and defenses, Surety has chosen a method to fully satisfy the Corps' demands, pursuant to which Surety shall tender to the Corps a new contractor to assume APTUS Company's obligations to the Corps under the Contract for a completion price of $1,350,000.00 (plus $47,500.00 for the optional hiring of skilled craftsmen), and

WHEREAS, L & S Electric, Inc. of Schofield, Wisconsin, is ready, willing and able to assume APTUS Company's obligations to the Corps and has agreed to do so pursuant to the terms of an Agreement entered into between the Corps and L & S Electric, Inc., or even date herewith (hereinafter referred to as the "Completion Contract"), a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference as if set out verbatim;

NOW, THEREFORE, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by both parties, the Corps and Surety have agreed and do hereby agree as follows:

1. The Surety hereby tenders to the Corps and the Corps hereby accepts L & S Electric, Inc. to complete the work as the Corps' prime contractor on the Project in accordance with the terms of the Completion Contract.

2. Subject to the terms of this Paragraph 2, the Surety shall pay to the Corps the sum of $188,887.00, the difference between the cost to complete the Contract (the Completion Contract price) and the balance remaining unpaid under the Contract. Said sum shall be paid by Surety to the Corps upon the execution of this Tender Agreement.

3. The Corps hereby fully and finally releases and forever discharges the Surety from and against any and all claims, demands, obligations and causes of action, of whatever nature, which the Corps had, has or may ever have against the Surety arising out of or in any way relating to APTUS Company's performance of or failure to timely and properly perform or complete the Contract, and any and all claims,

demands, obligations and causes of action which the Corps had, has or may ever have against the Surety's Performance Bond No. H00530 issued on behalf of APTUS Company in connection with the Project.

4. The Surety hereby agrees that its Payment Bond No. H00530 shall remain in full force and effect according to its terms, but only as it relates to claims for materials, equipment, services and/or labor supplied or furnished to APTUS Company by any third parties in connection with the Project prior to the date of this Tender Agreement; provided, however, that the Surety's obligation under said Payment bond shall in no event exceed and is hereby expressly limited to the expenditure of the penal sum of said Bond as set out above.

5. As partial consideration for the foregoing, the Corps hereby expressly assigns and transfers to Surety, and subrogates Surety to, all claims, demands, causes of action, rights and equities which the Corps had, has or may ever have against APTUS Company arising out of, in any way relating to or evidenced by its Contract with APTUS Company, and agrees that the Surety may pursue such claims, demands, causes of action, rights and equities as the Surety deems advisable.

6. Nothing in this Tender Agreement, nor in Surety's performance hereunder, shall prevent the Surety from enforcing any and all claims, rights or causes of action which Surety or its Principal, APTUS Company, may have against the Corps, including, without limitation, any claim of APTUS Company that it was or is entitled to an equitable adjustment or is owed additional compensation under the Contract, or any claim of APTUS Company that the Corps wrongfully terminated the Contract.

7. This Tender Agreement is binding upon the parties hereto and their respective successors and assigns provided, however, that no right of action shall accrue hereunder to or for the use or benefit of any person or entity other than the parties hereto, their respective successors or assigns.

8. This Tender Agreement represents the entire integrated

agreement between the parties hereto and supercedes all prior negotiations, representations or agreements, and may be amended only by written instrument executed by authorized representatives of both the Corps and Surety.

9. The parties hereto have voluntarily entered into this Tender Agreement based upon their independent investigation, without relying upon any representation of the other party or its agents, attorneys or representatives.
10. The provisions of this Tender Agreement shall be applied and interpreted in a manner consistent with each other so as to carry out the stated purpose and intent of the parties, but if for any reason any provision(s) hereof is/are held to be invalid or unenforceable, such provision(s) shall be deemed severed from this Tender Agreement and the remaining provisions shall be carried out with the same force and effect as if the severed provision(s) had not been a part of this Agreement.
11. This Tender Agreement shall be governed by the laws of the United States of America and, to the extent necessary, by the laws of the State of Michigan.
12. This Tender Agreement may be executed in one or more counterparts, including facsimile counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same Agreement.

IT WITNESS WHEREOF the parties have executed this Tender Agreement as of the date and year first written above.

U. S. ARMY CORPS OF ENGINEERS
Detroit District

By: GEORGE FEDYNSKY
Title: Contracting Officer
Date: 08 SEP 2000

CHATHAM REINSURANCE CORPORATION

By:
Title: Attorney
Date: 9-8-00

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
P00011	08-Sep-2000		

6. ISSUED BY: CODE W90MES03
USA ENGINEER DISTRICT-DETROIT
CORPS OF ENGINEERS
PO BOX 1027

DETROIT, MI 48231-1027

7. ADMINISTERED BY (If other than item 6) CODE
See Item 6

8. NAME AND ADDRESS OF CONTRACTOR (No., Street, County, State and Zip Code)

APTUS COMPANY
S Emanuel Lin
3527 WOODVALLEY DRIVE
HOUSTON TX 77025-4733

9A. AMENDMENT OF SOLICITATION NO.

9B. DATED (SEE ITEM 11)

X 10A. MOD. OF CONTRACT/ORDER NO. DACW54-99-C-0001

X 10B. DATED (SEE ITEM 13) 02 Nov 1999

CODE 0FUC3 FACILITY CODE 0FUC3

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offer ☐ is not extended, ☐ is extended.

Offer must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning ____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS.
IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(B).

C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:

D. OTHER (Specify type of modification and authority)
SURETY OFFER ACCEPTANCE

E. IMPORTANT: Contractor [X] is not, ☐ is required to sign this document and return ____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

APTUS CO. is deleted from the contract due to a termination for default. Pursuant to a tender agreement with Chatham Reinsurance Corporation, L & S Electric, 5101 Mesker Street Schofield, Wi. 54476 is accepted as the Completion Contractor. L & S's proposal of 7 September 2000 is accepted and incorporated into the contract. The contract price is increased by $124,890.00, from $1,225,110.00 to $1,350,000.00. Option item 0016 is $47,500.00. Bonds are due by 19 September 2000.

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)	16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)
	GEORGE FEDYNSKY / ADDED BY SUM
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
(Signature of person authorized to sign)		BY (Signature of Contracting Officer)	08 Sep 2000

NSN 7540-01-152-8070 — 30-105-03 — STANDARD FORM 30 (REV. 10-83) Prescribed by GSA FAR (48 CFR) 53.243

BEST AVAILABLE COPY

CORPORATE
Post Office Box 749
5131 Messer Street
Schofield, WI 54476-0749 USA
Phone: 715.359.3165
Fax: 715.359.9831
Web: www.lselectric.com

QUOTATION

To: Department of the Army
Detroit District,
Corps of Engineers
477 Michigan Avenue
Detroit, MI 48226

Quotation No.: E00274-RJH-083001
Prices firm for: 30 days
Date: September 07, 2000
Cage Code: 9S407
DUNS: 053088829
TIN: 39-1 077534

Attn: Mr. George Fedynsky

Subject: DACW35-98-B-0024
Powerhouse Automation Installation,
Sault Ste. Marie, Michigan

L&S Electric, Inc. is pleased to quote the following:

Item	Description	Unit	U/I	Ext.Amount
0001	Site Mobilization to Accomplish Work	1.00	JB	$ 50,000
0002	Site demobilization to remove equipment, cleanup and restore the site to original condition	1.00	JB	$ 15,000
0003	Engineering Design and Support	1.00	JB	$200,000
0004	Installation of the Excitation System for Units 1, 2 and 3	1.00	JB	$140,000
0005	Installation of the Excitation System for Unit 3A	1.00	JB	$ 40,000
0006	Installation of the Excitation System for Unit 10	1.00	JB	$ 60,000
0007	Installation of Units 1, 2 & 3Governor Retrofits	1.00	JB	$ 65,000
0008	Installation of Unit 3A Governor Retrofit	1.00	JB	$ 50,000
0009	Installation of Unit 10 Governor	1.00	JB	$ 60,000
0010	Installation of SCADA System	1.00	JB	$120,000
0011	Neutral Grounding System	1.00	JB	$175,000
0012	Unit 10 Switchboard	1.00	JB	$ 80,000
0013	Miscellaneous Switchboard Modification	1.00	JB	$ 80,000
0014	15 kV and Switchgear Modifications	1.00	JB	$150,000
0015	Spare Parts	1.00	LT	$ 50,000
0016	Skilled Craftsman Hire (Hours Est.) (Optional)	1,000.00	$47.50/HR	$ 47,500
0017	Parts and Materials (Not to Exceed $15,000)	1.00	JB	$ 15,000

Sub Total - $1,397,500
Less Item 0016 - ($47,500)
Contract Total - **$1,350,000**

Department of the Army.
E00247-RJH-083001
September 07, 2000
Page 2 of 2

This quotation is based upon the following clarifications:

Project Schedule
The completion date of the project is proposed to be October 19, 2001. The completion date of October 19, 2001 is based upon receiving a contract no later than September 8, 2000. A formal project schedule will be submitted to the Government within 10 business days after receipt of a contract.

Liquidated Damages
Liquidated Damages will be based upon the proposed final completion date of October 19, 2001.

Existing Equipment
L&S Electric, Inc. will not be responsible for equipment that is already present at the job site, and is determined to be missing and/or damaged. A full inventory of parts and an assessment of their physical condition are to be performed by and between the government and L&S Electric prior to the commencement of on-site construction.

Existing Drawings
L&S Electric, Inc. will not be responsible for inaccuracies within existing drawings, which are either provided by equipment suppliers or the government. Installation of equipment and associated wiring will be performed based upon the drawings made available to L&S Electric, Inc. by the government.

Please feel free to contact me with any questions at 715.241.3420.

Sincerely,

L&S ELECTRIC, INC.

Ronald J. Hahn
Manager, Application Engineering
Engineering Division

AM-SM-MF

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE OF PAGES
J	1 | 7

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
P00012	18-Jun-2001		Install Automation

6. ISSUED BY CODE W56ME502
USA ENGINEER DISTRICT-DETROIT
CORPS OF ENGINEERS
PO BOX 1027
DETROIT MI 48231-1027

7. ADMINISTERED BY (If other than Item 6) CODE
See Item 6

8. NAME AND ADDRESS OF CONTRACTOR (No., Street, County, State and Zip Code)
LAS ELECTRIC, INC
5101 MESKER ST
SCHOFIELD WI 54476-0740

CODE 0S407 FACILITY CODE 0S407

	9A. AMENDMENT OF SOLICITATION NO.
	9B. DATED (SEE ITEM 11)
X	10A. MOD. OF CONTRACT/ORDER NO. DACW35-98-C-0001
X	10B. DATED (SEE ITEM 13) 02-Nov-1998

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offer ☐ is extended, ☐ is not extended.

Offer must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended by one of the following methods: (a) By completing Items 8 and 15, and returning ____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(B).

X C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
Mutual Agreement

D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return 1 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)
See continuing pages ...

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)	16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)
SOROUSH ADIB, VP OF ENGINEERING	GEORGE FEDYNSKY / ADDED BY SUMI
15B. CONTRACTOR/OFFEROR	**15C. DATE SIGNED**
(Signature of person authorized to sign)	6/20/01
16B. UNITED STATES OF AMERICA	**16C. DATE SIGNED**
BY (Signature of Contracting Officer)	19-Jun-2001

EXCEPTION TO SF 30
APPROVED BY OIRM 11-84

30-105-04

STANDARD FORM 30 (Rev. 10-83)
Prescribed by GSA
FAR (48 CFR) 53.243

SECTION SF 30 BLOCK 14 CONTINUATION PAGE
SUMMARY OF CHANGES

Changes in Solicitation/Contract/Order Form

The total cost has increased from $1,225,110.00 by $169,890.00 to $1,395,000.00

Changes in Section 00010

CLIN 0018 was added.

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0018		1.00	Lump Sum	$124,890.00	$124,890.00

TAKEOVER INCREASE

FFP - Pursuant to tender agreement with Chatham Reinsurance Company. See Modification P00011.

NET AMT $124,890.00

CLIN 0019 was added.

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0019		1.00	Lump Sum	$45,000.00	$45,000.00

Site Investigation and Record Drawing
FFP

NET AMT $45,000.00

Changes in Section SF 30

CLARIFICATION

1. The last modification to this contract is P0001 1, dated 08 Sep 2000. With that modification the U.S. Army Corps of Engineers accepted L & S Electric as the completion contractor.

This contract has a continuing contracts clause. For administrative ease the contract is input into CEFMS in two ways: Aptus contract no. DACW35-99-C-0011 and E & L Electric contract no: DACW35-99-C-0001 with the designator CMPL. $56,497.00 is obligated under the Aptus Contract in CEFMS. The contract price with E & L is $1,350,000.00. This modification will increase the contract price to $1,395,000. Note, to date $500,000.00 has been allocated on E & L Electric's contract.

ADDED REQUIREMENT

The contract is modified to provide interim payment (part I) to the Contractor pending final negotiation of costs for digitizing and up-grading selected New Power Plant record drawings.

It is understood and agreed that, when this change is definitized, the Government will issue a second modification (part II) to increase the amount of contract line item 0018 to cover the entire cost of the change. The final cost (sum of parts I and II) of this work shall not exceed $70,000.00.

Definitization shall be accomplished by mutual agreement between Government and L&S Electric during execution of part I of the change. They will compile a list of drawings to the upgraded, agree on the desired level of detail and reach agreement on the amount of effort required for site investigation and execution of the drawings. Negotiated costs will be consistent with the price schedule offered by L&S Electric in the proposal dated May 7, 2001. The Engineering Services Rate Schedule is as amended on June 15, 2001.

By mutual agreement, L&S Electric shall furnish all plant, equipment and materials and perform all work necessary to accomplish the following:

(1) CHANGES TO THE SPECIFICATIONS

A. Refer to contract section 00010 entitled "SUPPLIES OR SERVICES AND PRICES/COSTS".

Add contract line item 0019 as follows.

Item	0019
Description	Provide record Drawings
Quantity	1
U/I	Lump Sum
Unit Price	$45,000.00
Amount	$45,000.00

2.1 RECORD DRAWINGS

2.1.1 Scope

The contractor shall convert selected drawings from the New Power Plant Record Drawing set to a vectorized format compatible with

Soo Area Office software. The contractor shall update the drawings to show true conditions as described by paragraph 2.1.3.

The record drawings required by this section are in addition to the (original) as-built drawing requirement stated elsewhere in the contract. The original as-built drawing requirement remains in full force and effect.

2.1.2 Included Drawings

The following New Power Plant record drawings are included in this requirement.

<The list of drawings shall be compiled by mutual agreement between the Contractor and the Government during execution of part I of this change. The list will appear in part II of this change.>

2.1.3 Representation of True Conditions

Record drawings prepared by the contractor shall show the true condition of pre-existing and newly installed equipment and appurtenances to the extent and with the level of detail agreed during execution of phase I of this change.

2.1.4 Site Survey

The contractor shall conduct a comprehensive site survey by a qualified engineer or technician. Soo Area Office personnel shall provide access to equipment and to such drawings as are available in order to facilitate the work. The Government shall arrange a brief generator outage (approximately 8 hours) at each generating unit to facilitate the site inspection.

2.1.5 Site Survey Safety and Security

The site surveyor shall be subject to the same safety and security requirements established for installation crews. Pay particular attention to contract section 01100 and to the Safety and Health Requirements Manual (EM385-1-1).

- The contractor shall provide a letter stating that law enforcement officials (typically, the local sheriffs office) attest that there are no outstanding warrants against the site surveyor.
- The contractor shall submit a digital photo of the surveyor or a standard photo that can be cropped to one inch by two inch size. The photo will be mounted on a security badge.
- If the site surveyor is working alone, he shall remain on flat ...

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE OF PAGES
J	1 | 4

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO (If applicable)
P00016	18-Sep-2001		Install Automation

6. ISSUED BY — CODE W56MES02
USA ENGINEER DISTRICT-DETROIT
CORPS OF ENGINEERS
PO BOX 1027
DETROIT MI 48231-1027

7. ADMINISTERED BY (If other than item 6) — CODE
See Item 6

8. NAME AND ADDRESS OF CONTRACTOR (No., Street, County, State and Zip Code)
L&S ELECTRIC, INC
BOROUGH ADIB
PO BOX 740
SCHOFIELD WI 54476-0740

	9A. AMENDMENT OF SOLICITATION NO.
	9B. DATED (SEE ITEM 11)
X	10A. MOD. OF CONTRACT/ORDER NO. DACW35-98-C-0001
X	10B. DATED (SEE ITEM 13) 02-Nov-1998

CODE 96407 — FACILITY CODE 96407

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offer ☐ is extended, ☐ is not extended.

Offer must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(B).

X C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF: Mutual Agreement

D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return 1 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)
SEE FOLLOWING PAGES ...

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)	16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)
SOROUSH ADIB, V.P of Engineering Div.	GEORGE FEDYNSKY / ADDED BY SUM
15B. CONTRACTOR/OFFEROR: Borough Adib (Signature of person authorized to sign) — 15C. DATE SIGNED: 9/19/01	16B. UNITED STATES OF AMERICA BY (Signature of Contracting Officer) — 16C. DATE SIGNED: 18-Sep-2001

EXCEPTION TO SF 30
APPROVED BY GSA 11-84

30-105-04

STANDARD FORM 30 (Rev. 10-83)
Prescribed by GSA
FAR (48 CFR) 53.243

SECTION SF 30 BLOCK 14 CONTINUATION PAGE
SUMMARY OF CHANGES

Changes in Solicitation/Contract/Order Form

The total cost has increased from $1,408,905.00 by $25,000.00 to $1,433,905.00

Changes in Section 00010

CLIN 0019

The total CLIN cost has increased from $45,000.00 by $25,000.00 to $70,000.00

The unit price amount has increased from $45,000.00 by $25,000.00 to $70,000.00

Changes in Section SF 30

The contract is modified to include a list of Government record drawings to be digitized and upgraded by the Contractor. This modification is the second part (part II) of the two part action initiated with modification P00012 (part I). The list of drawings was compiled in fulfillment of modification P00012 and is hereby incorporated into the contract.

The value of (lump sum)contract line item 0019 is INCREASED by $25,000.00 from $45,000.00, as established by modification P00012, to $70,000.00.

CHANGES TO THE CONTRACT SPECIFICTIONS

(1) Refer to contract paragraph 01100-2.1.2. Replace the note between the parentheses "<>" with the following drawing list.

DC-179-35	DC-93-36
DC-179-36	DC-93-37
DC-179-37	DC-93-40
DC-93-10	DC-98-7
DC-93-14	SMR-PH-I-56/52/1
DC-93-29	SMR-PH-I-56/10/1

(2) Refer to Contract Section 00010 entitled "SUPPLIES OR SERVICES AND PRICESICOSTS".

Change the amount of contract line item 0019 from $45,000.00 to $70,000.00.

INSPECTORS QUALITY ASSURANCE REPORT (QAR)
DAILY LOG OF CONSTRUCTION - CIVIL
(ER 1180-1-6)

THE QCR WILL BE ATTACHED TO OR FILED WITH THE QAR

REPORT NUMBER: 571 — Page 1 of 1

TO:

DATE: 08 Apr 2002 - Monday

PROJECT: Installation of Power House Automation,Government Hydropower Plant (Soo)

CONTRACT NUMBER: DACW35-99-C-0001 NA

CONTRACTOR (Or Field Office): L&S Electric, Incorporated

WEATHER: Weather Caused No Delay

PORTION OF SCHEDULED DAY SUITABLE FOR OPERATIONS

STRUCTURAL EXCAVATION	BORROW EXCAVATION	EMBANKMENT	CONCRETE	STRUCTURE
0 %	0 %	0 %	0 %	100 %

TEMPERATURE

MINIMUM	MAXIMUM
20 °F	30 °F

HAS ANYTHING DEVELOPED ON THE WORK WHICH MIGHT LEAD TO A CHANGE ORDER OR FINDING OF FACT? ☒ NO ☐ YES (Explain)

24 HOUR PRECIPITATION

INCHES	EXISTING
0.00	M

NUMBER OF GOVERNMENT EMPLOYEES

SUPERVISORY	OFFICE	LAYOUT	INSPECTION	TOTAL	LABOR
3	0	0	1	4	0

RIVER STAGE

FEET	TIME
0.0	M

NUMBER OF CONTRACTOR'S EMPLOYEES

SUPERVISORY	SKILLED	LABORERS	TOTAL
2	1	0	3

NUMBER OF SHIFTS ☒ 1 ☐ 2 ☐ 3

FROM	TO	FROM	TO	FROM	TO
0630 M	1500 M	M	M	M	M

Attach list of the following: (a) Major items of equipment either idle or working, and (b) Number and classification of contractor personnel onsite
Note: If the contractor's Quality Control Report (QCR) contains the information it need not be repeated.

QA NARRATIVE(S)
Information, Instructions or Actions Not Covered in QCR:
Alan Spencer THIS IS THE K'S FIRST DAY ON SITE. WE HELD THE CO-ORDINATION MEETING THIS MORNING. THE K HAD THREE PEOPLE THERE AND THE CORPS HAD TEN. NAMES WOULD BE LISTED IN THE MEETING MINUTES. AFTER THE MEETING THE K WALKED THE SITE TO GET FAMILIAR WITH THE WORK AREA.
Miscellaneous Remarks and Visitors to Project:
Alan Spencer K IS DOING MOB AND GETTING USED TO THE SITE THIS DATE

INSPECTOR'S SIGNATURE	DATE	SUPERVISOR'S INITIALS	DATE
Al Spencer	04-12-02	AP	4-12-02

ENG FORM 2538-2, May 94 (CIVIL) — This form together with ENG Form 2538-1, Aug 92, is equivalent to Aug 89 version, ENG Form 2538, Dec 87, however, is obsolete. (Proponent: CEMP-CZ)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

APTUS Company	*	
Plaintiff,	*	
v.	*	No. 01-362 C
THE UNITED STATES,	*	(Filed June 4,2003)
Defendant.	*	

ORDER

Pursuant to this court's May 12,2003 Order, a status conference was held on June 2, 2003, with all parties present in open court, to resolve the parties' apparent impediments to an expeditious course of discovery. In connection therewith, the court ORDERED the following:

1. The parties shall appear together, first, at 9:00 am on Monday, June 23, 2003, at the Soo Area Office, St. Mary's Falls Canal, Sault Ste. Marie, MI, and next, at some time during the week of June 23,2003, at the Army Corps of Engineers at Patrick V. McNamara Federal Building, Room 659, 477 Michigan Avenue, Detroit, MI, where defendant has represented to this court that the documents and other objects of discovery specified in plaintiff's April 9, 2003 Motion to Compel the Production of Document, and April 16, 2003 Supplemental Motion to Compel the Production of Document are located. [1]

   Pursuant thereto, the parties shall examine plaintiff's aforementioned motions, paragraph by paragraph, and shall remain there in Michigan until such time as they de-

[1] Defendant has further represented to this court that any and all documents that are the subject of plaintiff's motions to compel located in Portland, OR and/or Washington, DC will be sent directly to plaintiff (in Texas), and will not require plaintiff's on-site presence.

finitively resolve, to the mutual satisfaction of both parties, the production of all documents and other objects so requested by plaintiff.

Should there be any issues relative to plaintiffs requests for documents, *e.g.*, the defendant has certain documents in its possession, but refuses to produce them, then the parties shall file a joint motion respecting any such documents for a ruling by this court.

2. Also, while plaintiff is in Michigan during the week of June 23, 2003, plaintiff shall make himself available to be deposed by defendant. Within five (5) days of the completion of said deposition, defendant must advise the court whether additional discovery is necessary, whereby defendant shall make a showing that the need for other documentary and/or deposition discovery was not known prior to deposing the plaintiff. Failure to so notify (and persuade) the court will constitute a waiver by the defendant, and defendant's discovery shall be deemed completed and concluded.

3. Plaintiff shall complete deposition discovery of the following named or otherwise identified persons on or before September 15, 2003: (i) George Fedynsky, Contracting Officer (ii) Stanley Jacek, Administrative Contracting Officer (iii) Jim Peach, Contracting Officer's Representative (iv) David Wong, (v) Rod Shank, (vi) the government's agent in charge of overseeing the completing contract, (vii) the completing contractor's estimator, and (viii) the completing contractor's chief engineer.

   Upon receipt by plaintiff of the documents pertaining to the performing contract (still in progress), plaintiff's discovery shall be deemed completed and concluded.

4. Based upon all of the foregoing, plaintiffs May 6, 2003 Unopposed Motion to Extend Discovery Deadline, until December 31, 2003, is hereby DENIED.

IT IS SO ORDERED.

Reginald W. Gibson

Reginald W. Gibson, *Senior Judge*

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE OF PAGES
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2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
P00040	05-Jan-2004	[illegible]	

6. ISSUED BY	CODE	7. ADMINISTERED BY (If other than item 6)	CODE
CONTRACTING DIVISION DETROIT DISTRICT, USACE P O. BOX 1027 DETROIT MI 48231-1027	W911XK	(DCO) AREA OFFICE DETROIT DISTRICT, USACE ST. MARY'S FALLS C SAULT STE MARIE MI 49783	H7M0T00

8. NAME AND ADDRESS OF CONTRACTOR (No., Street, County, State and Zip Code)	9A. AMENDMENT OF SOLICITATION NO.	
L&B ELECTRIC, INC SORDUSH AFB PO BOX 140 SCHOFIELD WI 54476-0140	9B. DATED (SEE ITEM 11)	
	10A. MOD. OF CONTRACT/ORDER NO. DACW35-99-C-0001	X
	10B. DATED (SEE ITEM 13) 02-Nov-1999	X
CODE 1S407	FACILITY CODE 1S407	

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offer ☐ is extended, ☐ is not extended

Offer must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended by one of the following methods:
(a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

☐ A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

☐ B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(B).

X C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
Mutual Agreement

☐ D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return 1 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)
See Continuing Pages

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)	16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print) STANLEY R. JACEK / ADDED BY SUM TEL: 616-493-3311 EMAIL:	
15B. CONTRACTOR/OFFEROR (Signature of person authorized to sign)	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA BY Stanley R. Jacek (Signature of Contracting Officer)
		16C. DATE SIGNED 07-Jan-2004

SECTION SF 30 BLOCK 14 CONTINUATION PAGE
SUMMARY OF CHANGES
SECTION SF 30 - BLOCK 14 CONTINUATION PAGE
The following have been added by full text:

FIELD ENGINEER & TRANSFORMER

It has been determined that in view of the necessity to provide for additional field engineering, and to purchase an upgraded phase shift transformer, it is in the best interest of the Government to modify this contract as follows:

- Provide onsite field engineering support for five weeks ($25,875.00).
- Provide an upgraded phase shift transformer to enable unit 3A to be auto-synced ($265.00).

It is understood and agreed that, pursuant to the above, time for completion of work remains UNCHANGED and the estimated total amount of the contract is INCREASED $26,140.00 from $2,145,941.65 as established by Modification P00038, to $2,172,081.65.

It is further understood and agreed that this modification constitutes compensation in full on behalf of the Contractor and its subcontractors and suppliers for all costs and markups directly or indirectly attributable to the change ordered herein, for all delays related thereto, and for the performance of the changes within the time stated.

SECTION 00010 - SOLICITATION CONTRACT FORM

The total cost of this contract was increased by $26,140.00 from $2,145,941.65 to $2,172,081.65.

CLIN 0031 is added as follows:

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0031		1.00	Lump Sum	$26,140.00	$26,140.00
	Field Engineer and transformer FFP			NET AMT	$26,140.00

FOB: Destination
INSPECTION AND ACCEPTANCE
The following Acceptance/Inspection Schedule was added for CLIN 0031:

INSPECT AT	INSPECT BY	ACCEPT AT	ACCEPT BY
N/A	N/A	N/A	Government